Filed 3/1/10 In re D.E. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re D.E., a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN & FAMILY SERVICES, Plaintiff and Respondent, v. D.E., Defendant and Appellant.	F058205 (Super. Ct. No. 01CEJ300202-5) **O P I N I O N**

THE COURT*

APPEAL from orders of the Superior Court of Fresno County. Jane Cardoza, Judge.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Gomes, J., and Kane, J.

D.E. (father) appeals from a 2009 order terminating parental rights (Welf. & Inst. Code, § 366.26) to his daughter, D.[1] D. has been a dependent child of the Fresno County Superior Court since 2001. Father contends the court erred, dating back to 2001, because there was no on-the-record inquiry of either parent regarding Native American heritage for the purposes of the Indian Child Welfare Act (IWCA; 25 U.S.C. § 1901 et seq.). He also challenges the court's finding at the section 366.26 hearing that it was likely D. would be adopted. On review, we affirm.

PROCEDURAL AND FACTUAL HISTORY

In August of 2001 when D. was approximately 18 months old, respondent Fresno County Department of Children and Family Services (department) detained her, her five-year-old sister C. as well as their three much older half-siblings and petitioned the court to exercise its dependency jurisdiction over them. The parents' ongoing domestic violence, coupled with the mother's history of neglect and substance abuse, placed the children at a substantial risk of serious physical harm or illness. (§ 300, subd. (b).)

Relevant to this appeal, the Judicial Council form Juvenile Dependency Petition (JV-101) then in use contained boxes, which a department social worker could mark, to indicate either "Child may be a member of, or eligible for, membership in a federally recognized Indian tribe" or "Child may be of Indian ancestry." Neither of these boxes were checked for D. or any of the other children. The department's detention report, submitted at the same time, included the statement "The [ICWA] does not apply." Except for the appearance of this statement in the department's subsequent reports, the record contains no other reference to the ICWA.

In November 2001, the superior court, having previously exercised its dependency jurisdiction, adjudged D. and the other children dependents and removed them from

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

parental custody. Despite more than 18 months of reunification efforts, neither father nor D.'s mother were able to regain custody.[2] In June 2003, the court terminated reunification services for father and the mother regarding D. and her sister C. The court also set the first section 366.26 hearing to select and implement a permanent plan for the two girls.

Meanwhile in the summer of 2003, a relative came forward interested in having the two girls placed with her. The girls were then living in separate foster homes and had not been placed together since September 2001. In December 2003, the department placed the girls in the relative's care.

Long-Term Foster Care Commencing in 2004 as the Court's Plan for D. and Her Sister

Although it was likely the girls would be adopted, the court at a January 2004 section 366.26 hearing determined termination would be detrimental to the girls on two separate grounds. One, their parents had maintained regular visitation and the girls would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i); former § 366.26, subd. (c)(1)(A).) Two, the relative with whom the girls had been placed was unable or unwilling to adopt because of exceptional circumstances, but was willing and able to provide the girls with a stable and permanent home, and removal would be detrimental to the girls. (Former § 366.26, subd. (c)(1)(B).) The court in turn selected long-term foster care as the appropriate plan for the girls.

A year later, the relative notified the department that due to her poor health she could no longer care for the girls. Consequently, in January 2005, the court ordered the girls removed from the previously ordered placement. The court also determined at a

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[2] On the other hand, the father of D.'s older half siblings eventually succeeded in having those children placed in his care subject to family maintenance services. Because he lived in another county, the Fresno court transferred the dependencies of those children to the other county in 2003.

subsequent hearing that long-term foster care remained the appropriate plan for the girls. In the meantime, they had been placed in the foster home of Mrs. O. where they appeared to be doing well. Mrs. O. was not willing to pursue a more permanent case plan at the time.

D.'s Need for Mental Health Therapy

Starting in December 2005, father and the girls' mother stopped visiting the girls. The missed visits emotionally upset both girls and led the department to request and the court to order mental health assessments for each girl and any recommended treatment. Although the parents later resumed visiting, their attendance was inconsistent.

D. began individual weekly therapy sometime in 2006. She was approximately six years old at the time. According to the foster parent Mrs. O., some of the issues being addressed in therapy were D.'s outbursts when she was angry or did not get her way as well as her enuresis. Eventually, a medical doctor would prescribe medication for D.'s enuresis.

In March 2007, D.'s therapist reported D. was making steady progress though there were instances, perhaps correlated to visits with the parents, when she regressed. Although D. would say she wanted to visit and even live with her parents, she had troubling memories of her parents' behavior and neglect. Also, there were still times when the parents did not show up for visits. The other major difficulty for D. was her need for a permanent place in a family who wanted her to join them. D. and Mrs. O. had a difficult relationship.

D.'s primary relationship appeared to be with her older sister C. who both behaviorally and socially guided D. D., however, was somewhat more independent and more adventurous than her sister. Over time, this would cause C. to be annoyed.

As of May 2007, questions about the appropriateness of the girls' placement in the O. home led to their removal. The department in turn placed the girls with a new foster

parent, Mrs. A. The girls had some difficulties in adjusting to this latest placement. Mrs. A. was unwilling to provide a more permanent plan of guardianship or adoption for the girls.

Move to a More Permanent Plan for D.

Then, in late summer 2007, the parents' failure to visit or maintain any appropriate contact with the girls and its effect particularly on D. led the court to suspend visitation until therapeutically advised. The court also permitted the department to publish information about the girls towards a goal of possible adoption.

In the fall of 2007, the department received and reviewed multiple home studies of prospective adoptive families interested in providing a more permanent plan for the girls. The department in turn selected the F. family as the best match for the girls. Visits between the girls and the F. family commenced in December 2007. D. appeared to have a good time while C. was withdrawn and quiet.

Although C. liked the F. family, she was not interested in having any more visits with them, let alone being placed with them. C., who was approaching her 12th birthday, was also not interested in adoption.[3] She did wish, however, to remain placed with D.

Meanwhile, D. enjoyed visiting with and getting to know the F. family. Her separate visits with the F. family may have contributed to a slight separation between the girls. D.'s therapist supported continuing the visits and eventually placing D. with the F. family.

D.'s Placement with the F. Family

By the spring of 2008, the department recommended D. be placed with the F. family who lived out of the area. Mr. and Mrs. F. remained interested in providing a

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[3] Selection of adoption as a permanent plan and termination of parental rights, for a dependent child 12 years or older who objects to adoption, is considered detrimental to the child. (§ 366.26, subd. (c)(1)(B)(ii).)

more permanent plan for both girls. The couple hoped C. would be more open to visits in the future. Whatever the outcome, the department would ensure the sibling relationship was maintained through visitation. The court granted the department discretion to place D. with the F. family in March 2008 and, upon placement, ordered twice-a-month visits between the girls.

Following the March 2008 hearing, the department's social worker met with the girls to discuss placement in the F. home. D. appeared to be fine with the proposed change of placement. Within a matter of days, she was placed with the F. family. D. was also referred to a new therapist.

C., who did not want to change placements, remained with Mrs. A. Meanwhile, C. appeared restive and unresponsive to mental health therapy, which commenced a few months earlier. Over the spring of 2008, however, C. significantly increased her willingness to communicate.

Evidence also emerged that D. was under the impression she was only having an extended visit with the F. family. She appeared very confused about the separation from her sister. Nonetheless, D. became more comfortable in her new home. C., however, encouraged D. to say she wanted to move back to Fresno and live with her (C.). This left D. torn between her loyalty and connection with her sister and her connection with the F. family.

Since her March 2008 placement in the F. home, D. blossomed in many ways and appeared to be thriving. D.'s outbursts or tantrums had decreased in frequency and intensity. They tended to occur only before and after visits with C. D. also appeared to be doing better without additional medical treatment for her enuresis. D. was generally a happy, energetic child who enjoyed new experiences. She also developed a close relationship with the F. family and could use both Mr. and Mrs. F. as a secure base for exploration, guidance and comfort.

In September 2008, Mr. and Mrs. F. expressed their concerns about the girls. In a written statement for the court, they reported C. was making D. more ambivalent about being adopted. D., who had been excited about being adopted, began parroting her sister's words after a recent visit and expressing great resistance to the idea. C. wanted to stay in foster care until she turned 18 and live in Fresno. C's foster mother appeared to have an agenda which was not in D.'s best interest and had a ripple effect on D.'s ability to commit to her adoption by the F. family.

Aware of this, the department decided in mid-September 2008 to deliver a strong message to C. and her foster mother about ending any inappropriate influence and working with C. to open her up towards adoption or a more favorable long-term placement. Mr. and Mrs. F. admitted they remained skeptical and offered an unsolicited opinion that C. be placed in a different foster home. They added if they saw the same behavior pattern continuing, they would recommend at some point discontinuing contact between the girls. Mr. and Mrs. F. added they did not say this lightly given the importance of sibling relationships. However, they also saw the emotional setbacks D. suffered after visits with her sister.

Similarly, D.'s new therapist reported D. was experiencing increased anxiety and agitation before and after visits with C. This might be an expression of D.'s profound conflict over staying with her sister or being placed in an adoptive home. The therapist knew C. had been encouraging D. to ask for placement with her (C.). C.'s foster mother also seemed to be having difficulty supporting the girls' movement to permanent placement. In the therapist's view, all of the adults - social workers, foster parents and therapists - involved with these girls needed a common understanding of the reasons for placement and future options in order to decrease the girls' confusion.

The therapist also observed that the girls needed help in moving from a parent/child relationship to a healthy sibling relationship. She recommended the

therapists involved with these girls have a coordinated treatment plan to help the girls do so. In the view of D.'s therapist, D. needed to move her parental identification from C. to trusted adults and C. needed to move from identifying as the parent to being able to learn to trust and depend on parental figures herself.

To that apparent end, the court in October 2008 ordered a free exchange of information between C.'s therapist and D.'s therapist and an assessment by the therapists regarding sibling visitation. The following month the court found that long-term foster care should no longer be the permanent plan for D. and in turn set a new section 366.26 hearing for the child. The court also granted a formal request by Mr. and Mrs. F. for de facto parent status as to D.

Section 366.26 Hearing

On the date originally set for the new section 366.26 hearing, the court ordered liberal visits between the girls in the F. family's home.[4] Because the mother's whereabouts were unknown by this point despite a diligent search for her, the court ordered notice of the section 366.26 hearing for the mother by publication and continued the matter for a June 2009 trial.

Prior to the June 2009 section 366.26 hearing, the department prepared a report in which it recommended the court find D. likely to be adopted and order termination of parental rights. The report identified Mr. and Mrs. F. as D.'s prospective adoptive parents and favorably assessed their ability and commitment to adopt D.

D., who was by then nine years old, was physically well, developmentally on target, and making good progress in school. She was described as very conscientious of her hygiene and dress. She enjoyed talking with her sister and her friends. D. was also participating in karate which she liked. Her therapist had taken D. as far as she could go

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[4] Father has not augmented the appellate record to include a reporter's transcript for this hearing so that we might understand the basis for the court's decision.

with her and recommended another therapist. D. would be assessed for the additional therapy later in June. D. had also expressed her agreement to adoption. She felt safe and secure in the F. home and wished to remain permanently there. She believed she was part of the family. She also felt loved by Mr. and Mrs. F.

The report's only reference to C. was with regard to visitation. Sibling visits were to occur once a month but had been hindered by the distance between the girls' respective placements and C.'s refusal to participate in overnight visits. The F.s were willing to transport to and pick up the girls halfway in Modesto. C.'s foster parent, however, was unwilling to participate in transporting the girls.

According to its analysis of D.'s likelihood of adoption, the department reported:

> "[D.] is generally adoptable in that her current careprovders are willing to adopt her. She is healthy, happy and able to attach herself to adults as well as give love and receive love. [D.] does not appear to have any developmental or physical concerns. [D.] is currently placed in the home of her prospective adoptive parents. The prospective adoptive parents are very committed to providing [D.] with the most appropriate plan of adoption, with the termination of parental rights. It would not be detrimental to [D.'s] well being due to the positive relationship [D.] shares with her prospective adoptive parents."

Neither parent attended the June 2009 hearing and their respective attorneys presented no evidence or argument on the merits. The girls' attorney submitted on the department's report. The court found clear and convincing evidence that it was likely D. would be adopted and terminated parental rights.

DISCUSSION

I. ICWA

For the first time in the eight plus years of D.'s dependency, father argues there is no on-the-record showing that anyone asked either him or D.'s mother whether either parent had any Indian heritage. There is only the statement first contained in the department's 2001 detention report and repeated in its subsequent reports that ICWA did

not apply as well as the fact that the social worker who prepared the original petition did not mark available boxes on the petition form to indicate either "Child may be a member of, or eligible for, membership in a federally recognized Indian tribe" or "Child may be of Indian ancestry."

Father acknowledges appellate courts, as recently as 2005, have fairly inferred that the necessary ICWA inquiry was made when a social worker affirmatively represented in a report that ICWA did not apply. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1161; *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 942.) He nevertheless claims he is entitled to reversal on this appeal because there is no documented showing that an inquiry was in fact made. He does not profess that he or the mother would claim Native American heritage.

Father relies on a 2007 statutory amendment (§ 224.3, subd (a)) creating an affirmative and continuing duty of the court and the county welfare department to inquire in all dependency proceedings whether a child, for whom a section 300 petition has been filed, is or may be an Indian child. He also cites to a 2008 implementing rule of court (Cal. Rules of Court, rule 5.481(a)(1) & (2)). California Rules of Court, rule 5.481(a)(1) now requires the department to include with any section 300 petition a "Indian Child Inquiry Attachment form (ICWA-010(A))" (italics omitted) affirmatively disclosing whether an Indian child inquiry was made and, if so, what information was learned. California Rules of Court, rule 5.481(a)(2) similarly requires a court at the first appearance of a parent in any dependency case to order the parent to complete a "Parental Notification of Indian Status form (ICWA-020)" (italics omitted). Completion of this form enables a parent to affirmative claim or deny Native American heritage. The California Judicial Council adopted these forms for mandatory use effective January 1, 2008.

While father fails to address whether these recent changes in the law apply retroactively to ongoing dependency proceedings such as his daughter's, we need not resolve that issue here. This is because the time for father to raise his ICWA inquiry issue has passed. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 185 (*Pedro N.*).) In *Pedro N.*, this court held a parent who fails to timely challenge a juvenile court's action regarding ICWA is foreclosed from raising ICWA notice issues once the court's ruling is final in a subsequent appeal. Here, the superior court, presumably in reliance upon the department's representation that ICWA did not apply, conducted its disposition in 2001 removing D. and her siblings from parental custody without reference to the ICWA. If father believed the court erred, it was incumbent on him to appeal then and not wait eight additional years before raising the issue. (*Pedro N.*, *supra,* 35 Cal.App.4th at p. 185.)

II. Adoptability

Father also contends D.'s age, mental state and her relationship with her sister C. made it unlikely D. would be adopted within a reasonable time *should her current placement fail*. He assumes the court did not focus on D.'s traits which, in father's view, dictated against an adoptability finding. He points out D. was eight years old at the time of the section 366.26 hearing and had been in foster care placement since she was 18 months old. On the subject of her mental state, he argues D. suffered "emotional devastation" because she had experienced so much loss over the years as a result of the many changes in her placement, among other things. He assumes D. will likely suffer more if the prospective adoptive parents were to discontinue D.'s relationship with C., whom appellant characterizes as D.'s "rock." In his view, this cannot be in D.'s best interest. Father therefore urges that D.'s emotional difficulties coupled with her age will likely discourage others from adopting D., should her current placement in the F. home fail, such that it was error to find D. adoptable. As discussed below, father's argument is meritless.

First, he fails to cite any authority and we know of none to support his premise that, in order to terminate parental rights, the trial court had to find D. was likely to be adopted should the present placement fail. The question before the trial court was, instead, whether it was likely D. would be adopted within a reasonable time (§ 366.26, subd. (c); *In re Zeth S.* (2003) 31 Cal.4th 396, 406.)

We agree the adoptability issue focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) In this case, however, there is nothing to suggest that the trial court did not focus on D. The undisputed evidence before the court was that D. was healthy, happy and able to attach herself to adults as well as give and receive love. She also did not appear to have at the time any developmental or physical concerns.

While father stresses D.'s age at the time of the section 366.26 hearing and the length of time she had spent in foster care, there was no evidence these factors made it difficult to find someone willing to adopt her. If father wished to make an issue out of these facts, he could have done so at the section 366.26 hearing by cross-examining the adoption social worker on the matter. Not only did he not do so, he did not even attend the section 366.26 hearing.

Similarly, his claim that D. must have been emotionally devastated due to losses she had experienced over the years is not supported by the record. In years past, D. experienced many placement changes and did show signs of attachment difficulties. While father points to the fact that D. required mental health therapy as a result, he also overlooks several important points.

It was the parents' neglect and failure to visit that initially triggered D.'s need for therapy. In any event, D. was making steady progress as early as 2007. To the extent she would regress there appeared to be a correlation between her regression and her visits

with the parents and later her visits with C. It was also the opinion of D.'s therapist, dating back to 2007, that D. needed a stable, structured home that would provide her consistency and help her overcome her mistrust of adults, something she was not experiencing at the time in foster care. However, in 2008, D. was placed in the F. home where she blossomed in many ways. She also developed a close relationship with the F. family and could use both Mr. and Mrs. F. as a secure base for exploration, guidance and comfort. As of the section 366.26 hearing, she was able to attach herself to adults as well as give and receive love. She appeared to overcome the emotional problems of her past.

This brings us to Mr. and Mrs. F., D.'s prospective adoptive parents. They have provided D. with the consistency and care that she needed as well as expressed interest in and commitment to adopting D. The existence of a prospective adoptive parent constitutes evidence that the child's age, physical condition, mental state, and other relevant factors are not likely to dissuade individuals from adopting the child. In other words, a prospective adoptive parent's willingness to adopt generally indicates the child is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. (*Sarah M., supra,* 22 Cal.App.4th at pp. 1649–1650.)

There was also no showing that the F.s' commitment to adoption or ability to adopt was in any way questionable. Indeed, it was based on their adoptive home study that the F. family had been determined to be the best match.

Next, to the extent father argues over the importance of D.'s relationship with her sister C., we offer these observations. Even father acknowledges there is no authority for his proposition that a court should consider a sibling relationship in assessing a child's adoptability. In addition, at least one court in *In re Erik P.* (2002) 104 Cal.App.4th 395, 401, has determined the sibling relationship has no bearing on the adoptability question.

In any event, there was no evidence that D.'s sibling relationship made her less likely to be adopted. The record at most reveals that in the summer and early fall of

2008, some nine months before the section 366.26 hearing, C. was encouraging D. to say she wanted to move back to Fresno and live with her (C.). Consequently, D. appeared torn between her loyalty and connection with her sister and her connection with the F. family. As of the June 2009 section 366.26 hearing, however, D. agreed with the permanent plan of adoption and wished to remain in the F.s' care.

Furthermore, a sibling relationship may provide a basis for a court's determination that, notwithstanding the likelihood of a child's adoption, parental rights termination may be detrimental to the child. (§ 366.26, subd. (c)(1)(B)(v); *In re Erik P., supra,* 104 Cal.App.4th at p. 401.) For this exception to apply, however, depends on whether termination would cause a substantial interference with the sibling relationship. (§ 366.26, subd. (c)(1)(B)(v).) If so, the court must consider a variety of factors regarding the relationship and then balance any benefit the child would obtain from ongoing sibling contact against the benefit of legal permanency the child would obtain through adoption. (*Ibid.*; *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 949.)

The problem for father is that neither he nor anyone else raised in the trial court any exception to adoption as D.'s permanent plan, let alone that termination would cause a substantial interference with the sibling relationship. It is perhaps because father has therefore waived the exception for appellate purposes (*In re Erik P., supra,* 104 Cal.App.4th at p. 403) that he resorts to his creative, yet unpersuasive, argument that the sibling relationship is relevant to the adoptability finding.

Finally, we observe that father ignores another important aspect of the record. While he stresses that D.'s primary relationship was with C., whom he characterizes as D.'s "rock," he overlooks the undisputed evidence that this was not a healthy sibling relationship for either child. The girls needed help in moving from a parent/child relationship to a healthy sibling relationship. D. needed to move her parental identification from C. to trusted adults and C. needed to move from identifying as the

parent to being able to learn to trust and depend on parental figures herself. To that end, the court in October 2008 ordered a free exchange of information between C.'s therapist and D.'s therapist and an assessment by the therapists regarding sibling visitation. Although the record is silent regarding the therapists' assessment, we can reasonably infer from the available evidence that some progress had been made, at least by D., given the court's early 2009 order for liberal visits between the sisters and D.'s expressed wish to be adopted and remain in the F.s' care.

In summary, we conclude there was substantial evidence to support the court's finding that it was likely D. would be adopted.

DISPOSITION

The order terminating parental rights is affirmed.